IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.3175 OF 2005

IN

SUIT NO.3185 OF 2003

Hamid Khan Mohd.Khan Pathan. ...Plaintiff.

vs.

Nazmunnisa Aziz Khan & others. ...Defendants.

And

Afzal Khan Aziz Khan & another. ...Respondents.

Ms.Seema Singh i/b. M.Shah Alam Khan, for plaintiff.

None for defendants

CORAM: D.K.DESHMUKH,J.

DATED: 8th June,2007.

P.C.:-

1. This is a notice of motion taken out by the plaintiff for setting aside the order dated 15th June,2005 passed by the Court as a result of which the chamber summons taken out by the plaintiff has been dismissed. The chamber summons no.1853 of 2004 was taken

out by the plaintiff for amendment in the plaint by bringing on record defendant nos. 1A and 1B as the legal heirs of the deceased defendant no.1. The chamber summons was taken out in December,2004. When the chamber summons came up before the Court on 3.5.2005 the Court found that the plaintiff has not served the defendants and other parties. Therefore, the Court directed the plaintiff to serve all the parties. When the chamber summons came up before the Court on 15.6.2005, the Court found that no affidavit of service was filed. Affidavit of service was handed over to the Court across the bar. Even that affidavit showed that the defendant no.3 was not served. The Court, therefore, directed the plaintiff to file a fresh affidavit of service. The Court also directed the plaintiff to pay cost of Rs.750/-. The cost was to be paid on or before 17.6.2005 and failure of plaintiff to pay cost was to result in dismissal of the chamber summons. The plaintiff did not pay the cost. No affidavit of service was filed. Therefore, the chamber summons stood dismissed.

2. This notice of motion has been taken out by the plaintiff for restoration of that chamber summons. By prayer clause (a) of the notice of motion, the plaintiff is asking for an order of restoration of the chamber summons and is also asking for extension of time to make payment of cost. Now the cost was to be paid as per the order of the Court to the legal service authority. That cost could have been paid by

the plaintiff even after 17.6.2005. No explanation has been given as to why if the plaintiff is only asking for extension of time to pay cost, despite expiry of so much time the amount of cost has not been paid. One would have understood if the plaintiff pays the cost and then ask for condonation of delay in paying of cost. What is significant, in my opinion, is that though Court adjourned the chamber summons for want of service and directed the plaintiff to pay cost, there is no explanation found as to what steps have been taken by the plaintiff to effect service on defendant no.3 from 15.6.2005. The learned Counsel appearing for plaintiff states that the defendant no.3 is avoiding service. Therefore, the plaintiff could have moved an application before the appropriate authority for permission to effect substituted service. No reason whatsoever has been disclosed for not doing so. The notice of motion is disposed of. This order, however, shall not come in the way of the plaintiff, in taking out a fresh notice of motion for the same relief after paying the amount of cost and explaining what steps were taken by the plaintiff to serve the defendant no.3.